CMT, Inc. *and* American Postal Workers Union, AFL-CIO. Case 16–RC–10242

May 4, 2001

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND WALSH

On July 28, 2000, the Acting Regional Director for Region 16 issued a Decision and Direction of Election (pertinent portions are attached as an appendix), in which he found that the Petitioner is *not* disqualified from representing the Employer's drivers in the Dallas/Fort Worth area because of an alleged conflict of interest.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a timely request for review of the Acting Regional Director's decision. The Employer contends that a disqualifying conflict of interest exists because the inner-city drivers employed by the Employer compete for the same work performed by the United States Postal Workers (USPS) drivers in the Dallas/Fort Worth area, who are represented by the Fort Worth Area Local of the Petitioner.[1] The Employer's request for review of the Acting Regional Director's Decision and Direction of Election is granted.

The Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record in this case with respect to the issue on review, we affirm the Acting Regional Director's conclusion that the Petitioner does not have a disqualifying conflict of interest with the Employer.

The Employer employs 35–50 inner-city drivers who pick up, transport, and deliver mail to 35 USPS area offices in and around the Dallas/Fort Worth area pursuant to contracts competitively awarded by USPS. The Employer also employs 260–275 over-the-road drivers.[2] The Petitioner, the APWU International Union, seeks to represent a unit of the Employer's inner city and over-the-road truckdrivers employed at or supervised from the Employer's Dallas, Fort Worth, and Tyler, Texas, and Oklahoma City and Tulsa, Oklahoma terminals or locations.

The Petitioner has a national collective-bargaining agreement with USPS, which, in effect, governs the wages, benefits, and terms and conditions of employment for all hourly USPS employees, including a unit of USPS inner-city drivers who pick up, transport, and deliver mail to the 35 USPS area offices in and around the Dallas/Fort Worth area.[3] The national agreement allows USPS to contract out work under defined circumstances. During 1995 to 1997, the APWU Fort Worth Area Local filed several related grievances pertaining to work contracted out by USPS in the Dallas/Fort Worth area. In an arbitration award issued on July 22, 2000,[4] Arbitrator I.B. Helburn found that USPS violated the national agreement when it contracted out work in an improper manner.[5] The arbitrator remanded the grievances to the parties to attempt to fashion an appropriate remedy, and retained jurisdiction over the grievances in the event that the parties were unable to reach an agreement. The APWU Fort Worth Area Local thereafter proposed to USPS that as a remedy the contracted work be returned to USPS. Relying on this arbitration award, inter alia, the Employer contends that the Petitioner has a disabling conflict of interest in representing its employees. We find no merit in this contention.

It is well settled that a union may not represent the employees of an employer if a conflict of interest exists on the part of the union such that good-faith collective bargaining between the union and the employer could be jeopardized. *Bausch & Lomb Optical*, 108 NLRB 1555 (1954). In order to find that a union has a disabling conflict of interest the Board requires a showing of a "clear and present" danger interfering with the bargaining process. The burden on the party seeking to prove this is a heavy one. *Garrison Nursing Home*, 293 NLRB 122 (1989), citing *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984), enfd. 783 F.2d 1444 (9th Cir. 1986).[6]

[1] The Fort Worth Area Local and the Petitioner are not the same entity. The Employer, however, is contending that the Petitioner is disqualified from representing these employees because of action the Fort Worth Area Local has taken to enforce rights that are defined by a national contract which the USPS has with the Petitioner. Therefore, for purposes of deciding the conflict-of-interest issue only, we will assume that they are the same entity.

[2] USPS drivers only deliver mail locally and not over-the-road.

[3] An APWU local may negotiate a local agreement with a particular branch of the USPS, but may not negotiate an agreement contrary to the national agreement.

[4] The Employer filed a motion and then a supplemental motion to reopen the record, seeking the introduction of the arbitration decision and a letter dated August 2, 2000, to the Employer from an APWU business agent to USPS proposing a remedy to effectuate the arbitration award. The motion is granted.

[5] The arbitrator found that USPS entered into emergency subcontracts, abolished jobs, and posted the bid for newly-created positions in violation of the national agreement.

[6] Imposing a heavy burden is justified because, otherwise, we would unduly be restricting employees' right to representation by the bargaining agent of their choice. As the U.S. Court of Appeals for the First Circuit has said:

> There is a strong public policy favoring the free choice of a bargaining agent by employees. The choice is not to be lightly frustrated. There is a considerable burden on the nonconsenting employer, in such a situation as this, to come forward with a showing that danger of a conflict of interest interfering with the collective-bargaining process is clear and present.

In *Bausch & Lomb Optical*, supra, the Board found that the employer met its "considerable burden" of proving that a conflict of interest existed because the union actually owned and controlled a business enterprise in the same industry and locality as the employer, in direct competition with the employer. The Board found that there was an "innate danger" that the union would be tempted to bargain with the employer based, not on the interests of the employees it represented, but rather on the interests of the competing business. The union might make demands calculated to hurt the employer's competing business, or even drive it out of business entirely, contrary to the best interests of the employees it purported to represent. Id. at 1559–1560. Calling the facts "unique," the Board held that "the Union cannot perform its statutory function as bargaining representative if simultaneously it is an immediate business competitor of the particular employer whose employees it purports to represent." Id. at 1562.

Thus, the Board's "conflict of interest" doctrine originated to address the "unique" circumstance where a union is in direct *business* competition with the employer whose employees it represents. That situation is a far cry from that present here, where a conflict is alleged to arise because the union *represents* employees of different companies who have a business relationship with each other. Needless to say, this situation is far from unique. Unions typically represent not only employees of companies doing business with each other, but also employees of direct competitors in the same industry. Surely, this situation does not present such an "innate danger" to the bargaining process that the Board could justify limiting employees' statutory right of free choice. To hold that an employer can refuse to deal with a union simply because that union also represents employees of a company doing business with the employer would improperly extend the conflict-of-interest doctrine far beyond its purpose.

As a general proposition, the "conflict of interest" doctrine has not been applied to restrict employees from selecting a bargaining representative solely because the labor organization represents both employees of an employer and the employees of a subcontractor doing business with their employer. There are only two cases in which the Board has found a conflict of interest where the union represented employees of both the employer and its subcontractor. See *Catalytic Industrial Maintenance Co.*, 209 NLRB 641 (1974), and *Valley West Welding Co.*, 265 NLRB 1597 (1982). In both cases, the Board emphasized that the union had committed an "overt act" showing that it was working at cross purposes with its duty to represent the subcontractor's employees and thus presenting a proximate danger of infecting the bargaining process. In *Catalytic*, the Board granted the employer's motion to revoke the union's certification, because the union, which represented employees performing maintenance work under a subcontract with another company, Oxochem, had sought in negotiations with Oxochem to eliminate the subcontracting of the work and to transfer the employer's bargaining unit employees to Oxochem. Thus, the Board found that the union was actually seeking, not only the rescission of the subcontract, but also the dissolution of the employer's bargaining unit. Id. at 646. In *Valley West*, the Board excused the employer's withdrawal of recognition from the union, which represented employees performing work under a subcontract with Consolidated Aluminum Corporation (Conalco), after the union, which also represented Conalco employees performing the same work, obtained Conalco's agreement to limit the subcontracting, thus resulting in a loss of work for the employer's employees. Id. at 1603.

The Employer relies on *Catalytic* and *Valley West* to argue that the Petitioner's proposal that the work which the arbitrator found to have been improperly subcontracted be returned to USPS presents an overt act showing a conflict of interest. We disagree and find the instant case to be distinguishable from *Catalytic* and *Valley West*. First, the Petitioner's proposal would not result in a significant loss of work to the bargaining unit as a whole. The work in dispute in the arbitration award involves only the Employer's 35–50 inner-city drivers, but it does not at all involve the Employer's 260–275 over-the-road drivers in the petitioned-for unit. By contrast, in *Catalytic*, the union sought dissolution of the employer's entire bargaining unit, and in *Valley West*, the union was successful in wholly removing subcontracted work from the employer, a small welding fabrication shop, resulting in a significant loss of work to the bargaining unit.

Further, at this time, any alleged conflict of interest in this case is speculative and does not present a "clear and present" danger. At the time the unions in *Catalytic* and *Valley West* committed the "overt acts" seeking the elimination of all bargaining unit jobs of the employer or the significant loss of work to the employer, they were the certified representatives of those bargaining units. Here, by contrast, the Petitioner has not been certified as the bargaining representative of the Employer's employees.

We find this distinction to be significant. Should the Petitioner become the certified representative of the Em-

NLRB v. David Buttrick Co., 399 F.2d 505, 507 (1968).

ployer's employees, it will no longer be faced with the possibility of USPS' subcontracting work to the Employer as a nonunion company. Thus, the Petitioner's interest in seeking to remove the subcontracted work may well cease to exist, and the Petitioner may well, after certification, drop its proposal under the arbitration award to return the work subcontracted to the Employer to USPS. Under these circumstances, we find that the Petitioner's proposal does not present an "overt act" showing a "clear and present danger" of interfering with the bargaining process. The likelihood that the Petitioner would pursue removal of the subcontracted work post-certification is far too speculative to warrant disqualifying the Petitioner from seeking to represent bargaining unit employees. See *Alanis Airport Services*, 316 NLRB 1233 (1995).[7]

Finally, we find that the employees are in the best position to decide if representation by the Petitioner will serve their interests and will make that decision by casting their ballots for or against the Petitioner in the representation election. See *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984), citing *Sierra Vista Hospital, Inc.*, 241 NLRB 631, 633 (1979), and *NLRB v. David Buttick Co.*, 399 F.2d 505, 507 (1st Cir. 1968).

Accordingly, based on the reasons set forth in the Acting Regional Director's decision and the foregoing, we affirm the Acting Regional director's decision.

ORDER

The Acting Regional Director's finding that the Petitioner is not disqualified from representing the Employer's inner-city drivers because of a conflict of interest is affirmed. The case is remanded to the Regional Director for further appropriate action.

APPENDIX

DECISION AND DIRECTION OF ELECTION

By its petition, the Petitioner seeks to represent a single, employerwide unit consisting of the Employer's full-time and regular part-time inner-city and over-the road truckdrivers employed at or supervised from the Employer's Dallas, Fort Worth, or Tyler, Texas, or Oklahoma City, or Tulsa, Oklahoma, terminals or locations. The parties stipulated, and I so find, that the petitioned-for unit is appropriate.

The sole issue in dispute in this case concerns whether the Petitioner has a conflict of interest which would serve to disqualify it from representing employees in the petitioned-for unit. The Employer operates trucking companies and is exclusively engaged in the pick up, transportation, and delivery of mail pursuant to contracts competitively awarded by the USPS. The Employer derives all of its business from its contracts with the United States Postal Service (USPS). Pursuant to this contractual agreement, the Employer picks up, transports, and delivers mail in, around, and outside the Dallas/Fort Worth area. In the performance of its business operations, the Employer employs 35–50 inner-city drivers who pick up, transport, and deliver mail to 35 USPS area offices in and around the Dallas/Fort Worth area. The Employer also employs 260–275 over-the-road, long-haul drivers.

The record reflects that the Petitioner represents USPS inner-city drivers. The Petitioner and the USPS have a collective-bargaining agreement (CBA), in effect which governs the wages, benefits, terms, and conditions of employment for all hourly USPS employees, including a unit of USPS motor vehicle service drivers who pick up, transport and deliver mail to 35 USPS area offices in and around the Dallas/Fort Worth area. The Petitioner owns no facilities, equipment, or motor vehicles and does not hire employees to pick up, transport or deliver mail.

The record revealed that the Employer's and USPS's inner-city drivers perform essentially the same duties in transporting and delivering mail for the USPS in and around the Dallas/Fort Worth area. The Employer's inner-city drivers and the USPS inner-city drivers move the mail between and among USPS processing and distribution centers to various USPS area offices located throughout the Dallas/Fort Worth area. The Employer's and USPS's inner-city drivers pick up mail at one USPS location, either load or assist in loading, transport and deliver the mail to the appropriate USPS area office(s) and then unload or assist in the unloading of mail at the receiving facility. The Employer's inner-city drivers and USPS inner-city drivers are also responsible for receiving any mail to be returned to the originating postal office or facility. The USPS drivers do not transport mail over the road, outside the Dallas/Fort Worth area.

The Employer's and USPS's inner-city drivers also interact with the same Dallas/Fort Worth area USPS personnel in the performance of their respective jobs. The Employer's inner-city drivers and the USPS inner-city drivers are governed by the same rules and regulations related to individuals who handle mail.

With respect to the wages and benefits for the Employer's inner-city drivers, the record reflects that such are set by the Service Contract Act's prevailing wage determination. The wages and benefits for USPS inner-city drivers are set by the CBA between the Petitioner and the USPS.

The Petitioner in this case is the APWU International Union and not the Local. While the record reflects that the Dallas or Fort Worth APWU Local may negotiate a local agreement with a particular branch of the USPS, no APWU Local may negotiate such an agreement that is contrary to the USPS/APWU CBA. Article 32 of the CBA between the Petitioner and USPS requires the USPS to provide the Petitioner certain information regarding the award of new (or renewal of existing) mail con-

[7] While potential conflicts may arise between the Petitioner and the Employer, we are confident that the collective-bargaining process encouraged by the Act is capable of meeting the changing conditions and challenges posed by bargaining in these units. Cf., *M.B. Sturgis, Inc.,* 331 NLRB 1298, 1307 (2000). Moreover, if an actual conflict of interest should arise after the certification of the Petitioner, a party may raise that issue at that time through appropriate procedures under the Act.

tracts to private mail contractors such as the Employer. The Petitioner uses this information to enforce the CBA.

Finally, the record evidence disclosed that a separate Fort Worth or Dallas Local of the Petitioner, which is not a party to this petition, has filed grievances on behalf of APWU-represented USPS motor vehicle service employees, including Dallas or Fort Worth USPS inner-city drivers, over the USPS contracting or subcontracting work to private mail contractors.

The Employer argues in its brief that the potential for an impermissible conflict of interest exists because the Employer's and USPS' inner-city drivers perform like jobs, from like facilities, drive like routes, interact with the same Dallas/Fort Worth USPS personnel and are governed by the same rules and regulations in the handling of mail. In support of its contention, the Employer asserted that the North Texas, Processing and Distribution Center in Coppell, Texas has 50–80 loading doors and during mail deliveries and/or pickups, USPS vehicles sometimes pull up to the same door that the Employer's drivers use and work next to each other. Additionally, on numerous occasions after the Employer transports the mail on a given day, the USPS may have additional mail to deliver to facilities in the Dallas/Fort Worth area and instead of waiting for the Employer or calling the Employer for a quote, the USPS may use USPS inner-city drivers to transport mail. The USPS drivers and the Employer's drivers both deliver mail originating from the Dallas bulk mail center to the north Texas facility. However, the USPS drivers only deliver mail locally and, as referenced above, do not engage in over-the-road, long-hauling of mail. Because of the identical nature of duties, the Employer argues there is direct competition between the USPS and Employer's employees. Notwithstanding this contention, the record reflects that these similarities apply to only a very small percentage of the Employer's work force. Moreover, such similarities do not compel a finding that the Petitioner has a disqualifying conflict of interest.

The Employer further argues that the Petitioner has an innate conflict of interest because of its desire that the USPS retain all of its mail delivery by truck in-house. In its brief, the Employer relies on *Catalytic Industrial Maintenance Co.***,** 209 NLRB 641 (1974), in support of its contention that the Petitioner should be disqualified from representing the employees in the petitioned-for unit. In *Catalytic*, a postcertification proceeding, the Board affirmed the administrative law judge who found the union's certification should be revoked because of an "overt act" committed by the union, creating a conflict of interest in the union's representation of the both the contracting (Oxochem) and subcontracting employers' (Catalytic) employees. The administrative law judge found that the union demanded that the subcontracting employees be brought "in-house" to the contracting employer and that demand, in fact, impacted the negotiation of a new collective-bargaining agreement between the union and the contracting employer, Oxochem. The judge noted that by seeking to force Oxochem to retain for its employees work which it had contracted to Catalytic, the union was acting in substantial conflict of interest with regard to its obligations to the employees of Catalytic and such conflict was inherently inimical to the bargaining relationship between the union and Catalytic.

The facts in the instant case are clearly distinguishable from those in *Catalytic Industrial.* First, the instant case is not a postcertification proceeding. Second, there is no record evidence that the Petitioner has performed any "overt act" tending to show that it would act in an inconsistent manner with its future representational obligations with regard to the employees in the petitioned-for unit.

The Employer also argues that the Petitioner should be disqualified from representing the employees in the petitioned-for unit because they will be in direct competition with USPS inner-city drivers thereby creating a conflict of interest for the Petitioner. While the record discloses that the Petitioner represents USPS inner-city drivers in the Dallas/Fort Worth area, there is no evidence or authority cited by the Employer to support its contention that this constitutes a disqualifying conflict of interest under Board law.

The Employer further argues that evidence of direct competition is not necessary to conclude that a conflict of interest exists in this matter. Notwithstanding this contention, it is well settled that enough evidence of a conflict of interest exists if "the proximate danger of infection of the bargaining process" exists. *NLRB v. Buttrick Co.*, 399 F.2d 505, 507 (1st Cir. 1968). The Employer speculates that if the Petitioner is certified to bargain on behalf of the Employer's inner-city drivers, the Petitioner will be in a position to make demands upon the Employer with respect to wages and benefit increases and if the Employer refuses, it could lead the Petitioner to strike and that could put the Employer out of business. The court in *Buttrick*, supra, remanded the case to the Board to determine whether the potential for conflict of interest would have an adverse affect on the bargaining relationship. The Board reaffirmed its earlier decision finding that evidence of a potential conflict of interest was remote. *David Buttrick Co.*, 167 NLRB 438 (1967). Upon review, the court reconsidered its earlier decision and affirmed the Board and stated there was a considerable burden on an employer to come forward with a showing that a danger of a conflict of interest interfering with the collective-bargaining process is clear and present. *NLRB v. Buttrick Co.*, supra. The Employer has not met this burden here and is simply speculating that a conflict of interest may exist.

In its brief, the Employer argues that the Petitioner has taken a consistent position against the privatization of USPS jobs and has uniformly opposed the contracting and/or subcontracting of any jobs covered by its national agreement with the USPS and that such evidences a conflict of interest. In further support of its position that the Petitioner has a disqualifying conflict of interest, the Employer argues that the Petitioner has negotiated a provision in the national agreement with the USPS restricting the USPS' right to contract work out. Article 32 requires the USPS to provide APWU certain information regarding the awarding of new contracts or the renewal of new contracts to truck carriers for the transportation of mail. The Employer also argues that the Petitioner has filed "probably dozens" of grievances in an effort to preclude the USPS from contracting out work and that the filing of those grievances over many years constitutes "overt acts" as described in *Catalytic,* supra. The Employer's reliance on *Catalytic,* is wholly misplaced. In the instant case, the Petitioner has not been certified as the exclu-

sive-bargaining representative of the Employer's inner-city drivers and the record evidence does not disclose any "overt acts" by the Petitioner demonstrating an "ulterior purpose" for representing the employees in the petitioned-for unit. Notably, the record evidence reflects that the Petitioner has not caused the Employer to lose any kind of business.

The Petitioner argues at the hearing and in its brief, and the parties stipulated, that the Petitioner is not in business competition with the Employer. Moreover, Petitioner owns no facilities, no equipment or motor vehicles and hired no employees to pick up, transport, or deliver mail. Notwithstanding the Employer's reliance on *Bausch & Lomb Optical*, 108 NLRB 1555, 1558 (1954), by this stipulation, the Employer has acknowledged a critical difference in this case from *Bausch & Lomb*. In that case, the union owned and operated a business that was in direct competition with the employer whose employees it sought to represent. As noted, there is no such evidence in this instant case, nor does the record support any reasonable inference that Petitioner intends to become a business competitor of the Employer.

The Petitioner also argues that the Employer has failed to adduce evidence warranting the Petitioner's disqualification from representing the employees in the petitioned-for unit. In support of its contention that no conflict of interest exists, the Petitioner cites a National Arbitration Panel decision in a matter between the American Postal Workers Union and United States Postal Service, dated July 24, 1992, wherein the arbitrator ruled that the USPS was not barred from contracting or subcontracting out work pursuant to article 32 of the APWU National Agreement. The Arbitrator's decision states in pertinent part:

> Evidence submitted to the arbitrator has not established that article 32.3 contemplated a competition between subcontractors and the Union. As a practical matter the Union has no equipment, no motor vehicles, and no transportation employees. It is the Employer, not the Union that employs mechanics, dispatchers, drivers, and others. It is the Employer that owns trucks and facilities, necessary to transporting mail by highway. The point of course, is obvious, but its implications may not be clear. Article 32.3 could not have been intended to establish a bidding competition between the Union and subcontractors because the Union was not in a position to contract with the Employer to provide such services.

It is well established that a union may not represent the employees of an employer if there exists a conflict of interest on the part of the union that would jeopardize a good-faith collective-bargaining relationship between the parties. The Board's standard for finding that a union has a disqualifying conflict of interest is the showing of a "clear and present danger" of interference with the collective-bargaining process. *Alanis Airport Services,* 316 NLRB 1233 (1995), citing *Bausch & Lomb Optical*, supra. In *Pony Express Courier Corp*., 297 NLRB 171 (1989) and *Garrison Nursing Home*, 293 NLRB 122 (1989) the Board found that disqualification was appropriate where a personal financial relationship exists between executives of a labor organization and the employer whose employees the union seeks to represent. The burden of proof for establishing that a disqualification exists falls on the Employer and "strong public policy favoring free choice of a bargaining agent by employees" is not to be "lightly frustrated." *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984), enfd. 783 F.2d 1444 (9th Cir. 1986), citing *Sierra Vista Hospital, Inc*., 241 NLRB 631, 633 (1979).

The Employer has failed to adduce any evidence or cite any case authority establishing the types of conflicts envisioned by the Board in the above-referenced cases. For the reasons stated above, and based on the record as a whole, I find that the Petitioner's representation of the Employer's employees does not constitute a "clear and present danger" to the collective-bargaining process and I do not disqualify the Petitioner from representing the employees in the petitioned-for unit.